MUHAMAD SAFARUDIN BABA & ANOR

v.

PP

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD NOOR AHMAD JCA
FAIZA TAMBY CHIK J
[CRIMINAL APPEAL NO: W-05-32 & 33-2000]
6 SEPTEMBER 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Section 37(da) - Presumption of trafficking - Whether could be invoked based on presumption of possession under s. 37(d) - Whether actual possession ought to be proven - Whether judge erred in usage of presumptions - Common intention - Penal Code, s. 34 - Whether criminal act carried out pursuant to pre-arranged plan - Whether presumption of knowledge could be imputed to co-accused*

The first and second appellant had been arrested with a box containing 1,031.9g of cannabis which was held by the second appellant. In relation to the 2nd appellant, the trial judge called for defence upon invoking the statutory presumption under s 37(d) of the Dangerous Drugs Act 1952 ('the DDA') and for the 1st appellant, the judge applied the presumption of common intention under s. 34 of the Penal Code ('the PC'). They were found guilty of trafficking cannabis under s. 39B(1)(a) of the DDA and sentenced to death. They appealed to this court against the said order.

Held:
Per Mohd Noor Ahmad JCA

[1] The trial judge had misdirected himself when he convicted the 2nd appellant on trafficking and common intention. The 2nd appellant was not found in actual possession of such drugs. He was only deemed to have been in possession and deemed to have known the nature of such drugs which arose from the finding that the box containing the said drugs was within the custody or under his control. The statutory presumption under s. 37(da) of the DDA applies only to actual possession. Thus, by convicting him for trafficking, the trial judge had erred by indirectly using the presumption of trafficking under s. 37(d) of the DDA to invoke the presumption of trafficking under s. 37(da). (pp 217 h & 218 b & d)

[2] Factors such as the drugs being used for personal consumption, the type of 'transporting' or 'carrying', the quantity involved, and whether or not the accused was an addict, would be relevant to rebut the presumption of trafficking under s. 37(da) of the DDA by reason of being found in actual possession of the said drugs. At present, the facts only justify the application of presumptions of possession and knowledge as to the nature of such drugs under s. 37(d) of the DDA. Therefore, the 2nd appellant could have only been convicted of an offence under s. 6 of the DDA for possession of such drugs and punishable under s 39A(2) thereof. (p 221 e, f & g)

[3] Common intention within the meaning of s. 34 of the PC implies a pre-arranged plan and to convict an accused person of an offence applying the section involves proving that the criminal act was done in concert pursuant to the pre-arranged plan. It would be difficult, if not impossible, to procure direct evidence to prove intention; likewise a prior concerted plan. In most cases, it has to be inferred from the acts or conduct of the parties or other relevant circumstances of the case. (p 222 b)

[3a] Although the conduct of the 1st appellant during the relevant period and his awareness that the 2nd appellant was carrying the box might be relevant factors in considering the element of common intention, but the knowledge presumed by s. 37(d) of the DDA upon the 2nd appellant ought not to have been imputed to the 1st appellant because he did not have the custody or control of the box. These factors, in themselves, at most raise the suspicion that the 1st appellant was involved but suspicion, regardless of its degree, is not evidence. (p 222 c-d)

[Appeal allowed; conviction quashed and sentence set aside.]

*[**Bahasa Malaysia Translation** Of Headnotes*

Perayu pertama dan kedua telah ditangkap dengan sebuah kotak mengandungi 1,031.9g canabis yang dibawa oleh perayu kedua. Berkenaan dengan perayu kedua, hakim perbicaraan telah memanggil pembelaan setelah menggunakan anggapan statutori di bawah s. 37(d) Akta Dadah Berbahaya 1952 ('ADB') dan pada perayu pertama, hakim telah menggunapakai anggapan niat bersama di bawah s. 34 Kanun Keseksaan ('KK'). Mereka didapati bersalah mengedar canabis di bawah s. 39B(1)(a) ADB dan dihukum mati. Mereka telah membuat rayuan ke mahkamah ini terhadap keputusan tersebut.

Diputuskan:
Oleh Mohd Noor Ahmad HMR

[1] Hakim perbicaraan telah menyalaharah dirinya bila dia menyabitkan perayu kedua atas kesalahan mengedar dan niat bersama. Perayu kedua tidak dijumpai dengan milikan sebenar dadah tersebut. Dia hanya dianggapkan dengan milikan tersebut dan diandaikan telah mengetahui sifat dadah tersebut yang timbul daripada pendapat bahawa kotak yang mengandungi dadah tersebut berada dibawah jagaan atau dibawah kawalannya. Anggapan statutori dibawah s. 37(a) ADB hanya terpakai kepada milikan sebenar. Maka, dengan menyabitkan beliau dengan mengedar, hakim perbicaraan telah tersilap dengan secara tidak langsung menggunakan anggapan mengedar dibawah s. 37(d) ADB untuk menggunakan anggapan mengedar dibawah s. 37(da).

[2] Faktor-faktor seperti dadah digunakan untuk pengambilan sendiri, kaedah 'penghantaran' atau 'penyimpanan', kuantiti terlibat, dan sama ada yang tertuduh seorang penagih, adalah relevan untuk mematahkan anggapan mengedar dibawah s. 37(da) ADB atas alasan penemuan milikan sebenar dadah tersebut. Pada masa kini, fakta hanya memberi justifikasi kepada penggunaan anggapan milikan dan pengetahuan akan sifat dadah tersebut dibawah s. 37(d) ADB. Oleh itu, perayu kedua hanya boleh disabitkan dengan kesalahan dibawah s. 6 ADB untuk milikan dadah tesebut dan boleh dihukum dibawah s. 39A(2).

[3] Niat bersama dibawah maksud s. 34 KK membayangkan suatu rancangan yang dibuat terlebih dahulu dan untuk menyabitkan yang tertuduh dengan suatu kesalahan menggunakan seksyen ini melibatkan membuktikan bahawa perbuatan jenayah dilakukan serentak dengan rancangan yang dibuat terlebih dahulu. Adalah susah, jika tidak mustahil, untuk mendapatkan keterangan langsung untuk membuktikan niat; sama sekali suatu rancangan serentak sebelum ini. Dalam kebanyakan kes, ia perlu diinfer daripada perbuatan atau kelakuan pihak-pihak atau lain-lain keadaan relevan kes tersebut.

[3a] Walaupun kelakuan perayu pertama pada masa yang berkenaan dan kesedarannya bahawa perayu kedua membawa kotak tersebut mungkin merupakan faktor-faktor relevan dalam mempertimbangkan elemen niat bersama, tetapi pengetahuan yang diandaikan dibawah s. 37(d) ADB ke atas perayu kedua tidak seharusnya dikaitkan dengan perayu pertama kerana kotak tersebut tidak berada dibawah jagaan atau dibawah kawalannya. Faktor-faktor ini, dengan sendirinya, setidak-tidaknya menimbulkan keraguan yang perayu pertama terlibat tetapi keraguan, tidak kira tahapnya, bukanlah bukti.

Rayuan dibenarkan; sabitan dibatalkan dan hukuman diketepikan.]

Case(s) referred to:
Mahbub Shah v. Emperor AIR (32) [1945] PC 116
Mohamed Hassan v. PP [1998] 2 CLJ 170
Ong Ah Chuan v. PP [1981] 1 MLJ 64
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545
Wong Kee Chin v. PP [1979] 1 MLJ 157

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 6, 37(d), (da), 39A(2)
Penal Code, s. 34

Misuse of Drugs Act 1973 [Sing], ss. 3, 15(c)

For the 1st appellant - Bhagwan Singh (Suzana Norlihan Alias); M/s Bhagwan Singh & Suzana
For the 2nd appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Jamal Mohamed DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-37-99]

Reported by M Maheswaran

JUDGMENT

Mohd Noor Ahmad JCA:
Both the 1st and 2nd appellants were convicted and sentenced to death on a charge of trafficking in 1,031.9 grammes of cannabis. The charge reads:

> Bahawa kamu pada 14 Januari 1999 jam lebih kurang 5.50 pagi di persimpangan Jalan Dato' Senu 10 dan Jalan Dato' Senu 11, Taman Dato' Senu, Sentul, Kuala Lumpur, Wilayah Persekutuan, dengan niat bersama oleh kamu berdua, telah mengedar dadah berbahaya iaitu 1,031.9 gram cannabis dan oleh yang demikian itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersekali dengan seksyen 34 Kanun Keseksaan.

On appeal, we allowed their appeals, quashed the conviction and set aside the sentence. However, in respect of the 2nd appellant we reduced the charge to an offence under s. 6 and punishable under s. 39A(2) of the Dangerous Drugs Act 1952 (the Act). He pleaded guilty to the substituted charge and we convicted him on that charge. After considering his mitigation we sentenced him to 12 years imprisonment to commence from the date of his arrest and ordered 10 strokes of whipping.

Briefly, the case for the prosecution is this:

On 14 January 1999 at about 5.30am PW1 together with L/Kpl. Ahmad Tarmizi and L/Kpl. Karim were on a crime prevention assignment at Jalan Dato' Senu 10, Sentul, Kuala Lumpur. PW1 saw the 1st appellant riding a motorcycle and coming out of the junction from Jalan Dato' Senu 11 to Jalan Dato' Senu 10 with the 2nd appellant as pillion rider who was holding a wooden box (exh. P4). PW1 signaled the 1st appellant to stop, but instead of stopping the 1st appellant swerved to the left of the road between the edge of the road and PW1, and passed PW1. The motorcycle accelerated and proceeded further towards L/Kpl Ahmad Tarmizi where it proceeded similarly on the side of the road and fell over beyond L/Kpl Ahmad Tarmizi. The 2nd appellant was apprehended by PW1 whilst his right leg was pinned underneath the motorcycle and holding the box. The 1st appellant got up and tried to run away but was arrested by L/Kpl Ahmad Tarmizi. The box was locked and no key was found on the appellants. The lid of the box was locked with a small padlock by way of a hinge. PW1 used a screw driver from his motorcycle to prise open the box. Inside the box the police party found a plastic bag with rubber bands, a plastic bag with empty small clear packets, a plastic bag with 60 small clear packets containing plant material suspected to be cannabis and a compressed slab of plant material wrapped in aluminium foil and clear plastic. Upon analysis, the chemist confirmed that the plant material found in the 60 small clear packets and the compressed slab of plant material were cannabis as defined in s. 2 of the Act.

The learned judge called for the defence in respect of the 2nd appellant by invoking the statutory presumption under s. 37(d) of the Act, that is to say, as he was found to have had in custody or under his control the box which contained the drug, until the contrary is proved, he was deemed to be in possession of the drug and until the contrary is proved, he was deemed to have known the nature of the drug. With regard to the 1st appellant, the defence was called by reason of s. 34 of the Penal Code ('the Code'), that is to say, common intention. The learned judge said:

> While conduct of the first accused leads to the irresistible inference that he knew what was in the locked wooden box P4, knowledge alone does not make him in possession so as to be liable for the offence of trafficking as defined in section 2 (see *Public Prosecutor v. Lai Ah Bee* [1974] 2 MLJ 74). Although he cannot be unaware that the second accused riding pillion behind him was holding the box P4, there is no direct evidence linking him to physical custody and control of P4. Though he clearly had knowledge of the existence of the box P4 held by the second accused, that fact alone would not lead to an irresistible conclusion that the first accused, as the rider, had physical custody and control of the box or that he or the second accused had knowledge of what was in the box P4. He cannot be held guilty unless he can be linked to possession of the dangerous drugs in the box P4.

At the same time, while the second accused had physical possession of the box P4, the conduct of the first accused as he tried to disregard the instructions of PW1 to stop cannot be burdened upon the second accused who was riding pillion and had no control over the motorcycle. In this case section 37(d) of the Dangerous Drugs Act was invoked to presume possession and knowledge of the dangerous drugs in P4 against the second accused.

The fact remains that there is no evidence linking the first accused to possession of P4, its contents of dangerous drug and knowledge of the nature of the dangerous drugs.

...

It is noted that the liability is in respect of acts, not knowledge. Thus knowledge of the contents and nature of contents of P4 of the first accused as betrayed by his conduct cannot necessarily be attributed to the second accused. Common intention would however make the first accused liable to the act of the second accused of possession of P4 as if he himself had possession of the box P4 directly.

...

It is not always possible to prove knowledge or intention by direct evidence. Likewise a prior concerted plan. It must be inferred from the acts and conduct of the parties and other relevant circumstances. A similar approach was adopted by the Supreme Court in *Shamsuddin bin Hassan & Anor v. PP* [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 SC. No particular period of time is required to elapse before an act can be evidence of a prior intention or a concerted plan. It can emerge immediately before the act, and no formal meeting and resolution is required. In other words, the common intention can be formed or can emerge at any time. It can be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make it out is a question of fact in each case. What is important is that such act, at the time it was committed, is carried out in respect of a concerted plan.

In this case, it was the second accused who was actually carrying the wooden box P4. Section 37(d) imposes a presumption rebuttable on a balance of probabilities, that he had possession of the cannabis in the wooden box, and that he knew the nature of the cannabis. While there is no evidence of a prior plan, the events showed that the first accused knew of the incriminating drugs in the box even though the box was locked and carried by the second accused. The first accused cannot be unaware of the second accused carrying the large box. There is no suggestion that the first accused was only carrying out the instructions of the second accused not to stop but to attempt to flee. The acts of the first accused leads to the irresistable inference he knew what was in the box was against the law. His acts, which betrayed his knowledge of the contents of P4, together with the knowledge presumed by section 37(d) upon the second accused shows a commonality of purpose in the carrying of P4.

These facts show clearly that the carrying of the box on the motorcycle was an act carried out in concert by the two accused persons sharing a common knowledge of what was in the box. Given the size of the box it would have been difficult if not impossible for the first accused to have carried the box on the motorcycle by himself. Furthermore the entire defences of the two accused persons at all times and as laid out in cross-examination does not suggest that each is blaming the other as the person solely involved. Although in *Shamsuddin bin Hassan & Anor v. PP* the appellant was acquitted, it would appear that the decision was based solely upon the lack of any evidence which of two persons in the car threw out the bag. The fact the accused was driving the car chased by the police did not appear to have been advanced to the said court for consideration.

In the circumstances the Court finds that the prosecution has successfully made out a *prima facie* case of a common intention against the accused persons in relation to the dangerous drugs in the box.

On the charge of trafficking the learned judge said:

The cannabis in the box were packed in one compressed slab and in 60 small sealed plastic bags. Inside the box was also found more small plastic bags similar to the ones used in the 60 small sealed packets, and rubber bands such as those ordinarily used to tie small bundles of packets. The cannabis is clearly not packaged for consumption. The quantity is so large as to be inconsistent with own consumption. There is no defence advanced in cross examination that either or both of the accused persons are users of cannabis.

In the case of the first accused, given a) the unchallenged evidence that the cannabis in the box weighed 1,031.9 gms, and b) he knew of the cannabis in the box carried on his motorcycle he was riding and held by his pillion rider, c) that they were acting pursuant to a common intention, and d) the form and quantity of the dangerous drug and the paraphernalia found in the box leads to the irresistible inference that the first accused, who is not and does not claim to be a drug user, was trafficking in the cannabis (see *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, PC).

The application of the presumption under section 37(da) of the Dangerous Drugs Act 1952 that unless he proves to the contrary, he is presumed to be trafficking in the said dangerous drugs which would add substantially to the prosecution case against the first accused is unnecessary.

In the case of the second accused, the evidence is more direct in that he had direct physical custody and control of the wooden box P4, and he cannot not know that he was carrying the box in his arms while riding pillion behind the first accused. He therefore has possession of the wooden box P4 and the presumption under section 37(d) of the Act applies, requiring him to prove on the balance of probabilities that he was not in possession of the dangerous drugs in the locked wooden box P4 and had no knowledge of the nature of such dangerous drugs.

> I have also considered the fact the wooden box P4 was locked. Now the lock is small padlock. The lid of the box P4 is locked with the padlock by way of a hinge. PW1 only needed a screwdriver from his motorcycle to pull out the hinge. The point made is that the box could be opened if the carrier wanted to do so. The position, to my mind, is no different from a sealed package. If the box had a more substantial locking arrangement such that a person must have a key to open the box, then the absence of the key is material. I find that is not the case here. The small and simple lock is obviously more easily removed than if the lid of the box had been nailed down. I find as a fact that the nature of the locking of the box in this case does dispel the presumptions under section 37(d) of the Act.
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> ...
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> Having considered all of the evidence adduced before the Court, be it by way of examination in chief cross-examination and re-examination, the defences laid out in cross-examination, and the submissions made thereon before the Court, this Court considered that the prosecution has made out a *prima facie* case against the accused persons, and in accordance with section 180(iii) of the Criminal Procedure Code, called upon the accused persons to enter upon their defences.

The appellants elected to give evidence under oath. The gist of the defence is that of being innocent carriers. Briefly, the appellants whilst on their way home at about 1am stopped at a football field and joined one 'Joe' who was playing a guitar with three others. At about 3am when they were about to leave Joe asked them to carry the box which Joe said contained things for his sister in the hospital, and to deliver the same to his brother Rahmat who was waiting at the emergency ward at the hospital. The learned judge found the defence to hold no truth whatsoever.

To keep within the limit of our function as the appellate court we decline to interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, it is incumbent upon us to intervene in a case where the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the same questions would have arrived at the same conclusion (see *Sivalingam v. Periasamy* [1996] 4 CLJ 545).

With due respect, we are of the view that the learned judge had misdirected himself when he convicted the 2nd appellant on trafficking in such drug by relying firstly, on the statutory presumption under s. 37(d) of the Act and secondly, on the quantity of such drug and the paraphernalia found in the box, the nature of its packing and the absence of defence that either or both of the appellants were users of cannabis, to conclude that such drug was not for

own consumption but was carried for the purpose of sale or distribution to others, which falls within the definition of trafficking in s. 2 of the Act. The learned judge relied on the Privy Council case of *Ong Ah Chuan v. PP* [1981] 1 MLJ 64. The learned judge also misdirected himself in convicting the 1st appellant on trafficking in such drug based on common intention.

It is pertinent to note that the 2nd appellant was not found in actual possession of such drug but only deemed to have been in possession and deemed to have known the nature of such drug based on the fact of being found having had in custody or under his control the box which contained such drug, that is to say, the only linkage between him and such drug is the fact of custody or control of the box which triggered the presumption of possession and knowledge. That being the case, he could not have been convicted of trafficking based on the quantity of such drugs found in his presumed possession because the statutory presumption under s. 37(da) of the Act applies only to actual possession. In fact, by convicting him for trafficking based on presumptions of possession and knowledge arising out of the fact of control or custody would tantamount to the learned judge indirectly using the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) thereof. This is manifestly erroneous (see *Mohamed bin Hassan v. PP* [1998] 2 CLJ 170. The learned judge relied on the definition of trafficking in s. 2 of the Act, in particular on the act of the 2nd appellant in carrying the box which contained such drug for the purpose of sale or distribution to others and cited the case of *Ong Ah Chuan v. PP supra* in support thereof. The decision in that case was based on the provisions of the Singapore Misuse of Drugs Act 1973 ('the Singapore Act'). Although the Singapore Act contains the offending section on trafficking (s. 3) that is virtually identical with our s. 39B(1) of the Act, the structure of the Act is quite different. In particular, under s. 15 of the Singapore Act even presumed possession of the specified quantity of a controlled drug will attract the statutory presumption of possession for the purpose of trafficking and whereas under s. 37(da) of the Act a person is presumed to be trafficking if, only if, he is found to be in actual possession of the dangerous drug. Section 15 of the Singapore Act states:

> Any person who is proved or presumed to have had in this possession more than:
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> a) ...
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> b) ...
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> c) 2 grammes of diamorphine (heroin) contained in any controlled drug; or
>
> d) ...

shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein.

And section 37(da) of the Act reads:

In all proceedings under this Act or any regulation made thereunder:

...

...

(da) any person who is found in possession of:

(i) 15 grammes or more in weight of heroin;

...

vi) 200 grammes or more in weight of cannabis;

...

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

...

In that case the accused person was found in actual possession of the heroin which exceeded 2 grammes and that he was transporting the heroin. He was convicted for the offence of trafficking and sentenced to death. His appeals to the Court of Criminal Appeal and subsequently to the Privy Council were dismissed. Lord Diplock said:

If nothing more is proved against an accused than the mere fact that he had the controlled drug in his possession, then an offence under section 6 is established but the graver offence under section 3 of trafficking is not, however large may be the quantity of the controlled drug involved.

The Court of Criminal Appeal so held in *Poon Soh Har v. Public Prosecutor* and *Seow Koon Guan v. Public Prosecutor*. This holding, in their Lordships' view, was clearly right.

So, simply to transport from one place to another a quantity of a controlled drug intended for one's own consumption, if unauthorised by the Act or Regulations, involves an offence of having the drug in one's possession under section 6 but does not amount to the offence of trafficking under section 3. It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find. This is the consequence of section 10 of the Drugs Act and section

3(c) (which covers the same ground in part). These provisions make the question whether the transporter of the drugs achieves that purpose irrelevant to his guilt of the offence of trafficking under section 3; since they provide that a person who does any act preparatory to, or in furtherance of, or for the purpose of the commission of the offence of trafficking in a controlled drug, shall be guilty of the substantive offence of trafficking and liable on conviction to the penalty provided for it under section 29 and the Second Schedule.

This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of sections 10 and 3(c) into operation some further step or overt act by the accused is needed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

With regard to the statutory presumption under s. 15 of the Singapore Act, His Lordship stated:

So the presumption works as follows, when an accused is proved to have had controlled drugs in his possession and to have been moving them from one place to another:

(1) the mere act of moving them does not of itself amount to trafficking within the meaning of the definition in section 2; but if the purpose for which they were being moved was to transfer possession from the mover to some other person at their intended destination the mover is guilty of the offence of trafficking under section 3, whether that purpose was achieved or not.

This is the effect of the provisions of section 3(c) and section 10.

(2) If the quantity of controlled drugs being moved was in excess of the minimum specified for that drug in section 15, that section creates a rebuttable presumption that such was the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon the balance of probabilities, that he had not intended to part with possession of the drugs to anyone else, but to retain them solely for his own consumption.

His Lordship referred to the following passage of the judgment in *Wong Kee Chin v. PP* [1979] 1 MLJ 157 which stated the effect of Singapore Act with clarity and accuracy:

> When it is proved that the quantity of diamorphine which the accused person was transporting (in the dictionary sense of the term) was two or more grams, a rebuttable presumption arises under section 15(2) **(not (2) but (c))** that the accused had the said controlled drug in his possession for the purpose of trafficking. Proof of the act of transporting plus the presumption under section 15(2) **(not (2) but (c))** would constitute a *prima facie* case of trafficking which if unrebutted would warrant his conviction. In those circumstances the burden of proof would clearly shift to the accused and he would have to rebut the case made out against him. The rebuttal will depend upon the evidence placed before the court. If he can convince the trial court by a preponderance of evidence or on the balance of probabilities that the drug was for his own consumption he would be entitled to an acquittal. Factors such as the type of 'transporting', the quantity involved, whether or not the accused is an addict, would be relevant. It would be a question of evidence and the inferences to be drawn from the totality of the evidence before the court. (emphasis added)

From the judgment, it is manifestly clear that the factors such as the drug was for personal consumption, the type of 'transporting' or 'carrying', the quantity involved, whether or not the accused was an addict, would be relevant to rebut the presumption under s. 15(c) of the Singapore Act that the accused had the said controlled drug in his possession for the purpose of trafficking; likewise in relation to the presumption of trafficking under s. 37(da) of the Act by reason of being found in actual possession of the said drug. However, in the case before us the facts do not justify the application of the presumption of trafficking under s. 37(da) of the Act as the 2nd appellant was not found in actual possession of the drug but only justify the application of the presumptions of possession and knowledge as to the nature of such drug under s. 37(d). Therefore, the learned judge in convicting the 2nd appellant for trafficking had erred in taking into account the quantity of drug and the paraphernalia found in the box, the nature of its packing and the absence of defence that either or both of the appellants were users of cannabis and in concluding that such drug was not for own consumption but was carried for the purpose of sale or distribution to others. To our mind, he could have been convicted only with an offence under s. 6 of the Act for possession of such drug and punishable under s. 39A(2) thereof.

In respect of the 1st appellant, common intention was inferred from his conduct for not stopping when ordered to do so by PW1 but attempted to flee, his awareness that the 2nd appellant was carrying the box and from the knowledge presumed by s. 37(d) of the Act upon the 2nd appellant; the sum – total of

which, according to the learned judge, shows clearly that the carrying of the box on the motorcycle was an act carried out in concert by both the appellants sharing a common knowledge of what was in the box. It is trite law that common intention within the meaning of s. 34 of the Code implies a pre-arranged plan and to convict an accused person of an offence applying the section it must be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is difficult if not impossible to procure direct evidence to prove intention; likewise a prior concerted plan. In most cases it has to be inferred from the acts or conduct of the parties or other relevant circumstances of the case (see the Privy Council case of *Mahbub Shah v. Emperor* AIR (32) [1945] PC 116). We are of the view that although the conduct of the 1st appellant on that occasion and his awareness that the 2nd appellant was carrying the box might be relevant factors in order to consider the element of common intention but the knowledge presumed by s. 37(d) of the Act upon the 2nd appellant ought not to have been imputed to the 1st appellant because he did not have the custody or control of the box. Those two relevant factors by themselves were not sufficient to raise the inference of common intention, although they might raise the suspicion that the 1st appellant was involved with such drug. Suspicion, no matter how strong, is not evidence.